No. 48618-1

IN THE COURT OF APPEALS DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

RAY C. HARRIS, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The trial court erred when it concluded statements Mr. Harris made to a police officer prior to his arrest were not the product of custodial interrogation. CP 133.

B. The trial court erred in admitting Mr. Harris's statements to Officer Beall into evidence.

B. Mr. Harris was denied his constitutional right to be free from custodial interrogation without a prior admonishment of rights under *Miranda v. Arizona.*

C. The trial court erred when it admitted the medical record and testimony into evidence under ER 803(a)(4) because it contained a statement not made for the purpose of medical diagnosis or treatment.

D. This Court should not impose appellate costs if the State substantially prevails on appeal.

Issues Related to Assignments of Error

A. Was Mr. Harris's statement to the officer inadmissible because it was obtained as a result of custodial interrogation without *Miranda* warnings? ?

B. Did the court violate Mr. Harris's right to confront his accuser when it admitted a medical record and testimony into evidence under ER 803(a)(4) which contained statements not made for the purpose of medical diagnosis or treatment?

C. Should this Court impose appellate costs if the State substantially prevails on appeal and submits a cost bill?

II. STATEMENT OF FACTS

1. Procedural Facts

Pierce County prosecutors charged Ray Harris by third amended information with (1) second degree assault, domestic violence, (2) violation of a protection order, and the conduct which constituted the violation was an assault which did not amount to an assault in the first or second degree, invoking RCW 26.50.110(4); or in the alternative, violation of a protection order and having had two previous convictions for violating orders issued under RCW 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34, invoking the provisions of RCW 25.50.110(5); and Count (3) assault in the fourth degree, domestic violence. CP 64-66. The State filed a persistent offender notice (Third Conviction). CP 5. Mr. Harris

represented himself at a bench trial, with appointed standby counsel. 9/22/15 RP 8; CP 6; 92-93.

3.5 Hearing

Tacoma police officer Beall responded to a 911 call around 9:30 pm on August 7, 2015. 1RP 38. Rather than going to the location of the call, Beall instead patrolled the area looking for Mr. Harris. 1RP 39. He saw Mr. Harris walking, about four blocks away from his home. 1RP 39-40. Beall parked his patrol car partially blocking the roadway. 1RP 51. He called Mr. Harris by name. 1RP 40. Beall testified Harris "was not under arrest and he was not detained, but if he would have tried to walk away, I believe I would have stopped him from walking away." 1RP 51.

Beall asked Mr. Harris, "What happened at the apartment?" 1RP 40. Harris told him he had made food for his girlfriend, Precious Gant, which she refused to eat. They argued. 1RP 40-41. She threw things at Mr. Harris and slapped him on the face. 1RP 41; 43. He said he slapped her back. 1RP 41.

Beall asked Mr. Harris if he "had an order with her or any warrants." 1RP 44. Harris said he knew there was a protection order but believed it had expired. 1RP 44. Beall confirmed there was a current protection order between them and based on

information radioed to him from Officer Butts, he arrested Mr. Harris. 1RP 44-45. He read Mr. Harris his *Miranda* rights. 1RP 45. Mr. Harris exercised his right to remain silent and simply said, "Let's just go to jail." 1RP 46.

The trial court found the statements made prior to arrest were voluntarily made, were not the product of custodial interrogation, and admissible against Mr. Harris. CP 133.

2. Substantive Facts

Officer Julie Dier was dispatched to an apartment in Tacoma to investigate a domestic disturbance at 9:30 pm on September 7, 2015. 2RP 128-29. When she arrived she met Precious Gant. 2RP 129. She observed a scratch or red mark on Ms. Gant's cheek and a scratch and a bruise on her upper left arm. 2RP 130. Her neck was slightly red. 2RP 131. Officer Dier sent out a description of the suspect to other officers in the area. 2RP 131. Ms. Gant was taken to the hospital. 2RP 114.

The emergency room nurse reported that Ms. Gant told her she had been punched and choked. 2RP 114-115. She wrote in her triage notes that Ms. Gant had already filed a police report and had a safe place to stay. 2RP 115. (Exh. 9 p. 2).

Mr. Harris objected to introduction of hearsay statements made by Ms. Gant to the emergency room physician as a violation of his constitutional right to confront his accuser. 2RP 82-85. The court overruled the objection. 2RP 86.

Dr. Scheer, the emergency room doctor examined Ms. Gant. 2RP 92. She testified that Ms. Gant told her her boyfriend punched her multiple times on the left side of her body. 2RP 92-93. Dr. Scheer documented a mild abrasion on Ms. Gant's left cheek and ear and tenderness to the left shoulder. 2RP 94;102. While Ms. Gant complained of shortness of breath and blurred vision, the physician attributed the shortness of breath to anxiety or fear and found nothing diagnostic about her vision. 2RP 83;94. An examination of Ms. Gant's neck showed a normal range of motion, no tenderness, no sign of airway compromise and no marks. 2RP 108-109. (Exh. 9 p. 5). Dr. Scheer gave Ms. Gant 1,000 mg of Tylenol. (Exh. 9 p.6). The medical record indicated Ms. Gant would "follow up with the police" and that she declined consultation with a social worker. (Exh. 9 p.6).

Ms. Gant did not testify. She knew that a material witness warrant had been issued for her, but did not disclose her location or contact information. 1RP 4-5.

At the end of the State's case, the court dismissed the charge of second-degree assault based on insufficient evidence. The court found Mr. Harris guilty of violation of a protection order (Count II) and guilty of assault in the fourth degree (Count III) as charged in the amended information. CP 138-142. 2RP 142;147-148. The court imposed 48 months, with 12 months of community custody. 2RP 176. The court considered Mr. Harris's future ability to pay costs, found him indigent, and imposed only the statutory fines. 2RP 177. Mr. Harris makes this timely appeal. CP 148-150.

III. ARGUMENT

A. Mr. Harris's Statement to Officer Beall Was Inadmissible Because It Was Obtained As A Result Of Custodial Interrogation Without A *Miranda* Warning.

An appellate court conducts a *de novo* review of conclusions of law to determine voluntariness in an order pertaining to suppression of evidence. *State v. Diluzio,* 162 Wn.App. 585, 589, 254 P.3d 218 (2011).

This court reviews the trial court's custodial determination *de novo*. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). The test for determining whether an individual was in custody at the time of the questioning is an objective one: whether a reasonable

person, in the individual's position, would believe he was free to walk away. *State v. Short,* 113 Wn.2d 35, 41, 775 P.2d 458 (1989) In *Mendenhall,* the United States Supreme Court held that a person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained. *U.S. v. Mendenhall,* 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Here, Mr. Harris was walking along the roadway. Officer Beall pulled his patrol car over, angling it so he was blocking part of the roadway. He got out of his car and called Mr. Harris by name. The officer admitted that had Mr. Harris tried to walk away from him, the officer would have stopped him. 1RP 40. Washington case law provides that an officer's unstated thoughts are irrelevant and have no bearing on the question of whether a suspect is 'in custody'. *State v. Solomon,* 114 Wn.App. 781, 790, 60 P.3d 1215 (2002). However, here the context of the encounter is relevant. It is evident from the record that what Mr. Harris saw was a police car pulling over to him, the officer getting out of the car, the officer calling him by name, and the officer asking him, 'What happened at the apartment?" No reasonable person in that circumstance would

have believed he could end the encounter and not answer the officer's question.

In *Lewis,* the Court considered whether the defendant was in custody for Miranda purposes when he made an incriminating statement to police. *State v. Lewis,* 32 Wn.App. 13, 17, 645 P.2d 722 (1982). There, the defendant arrived voluntarily at the interview, was not placed under arrest, and was free to end the contact whenever he chose. *Id.* at 18. The Court found that even though Lewis was not technically in custody, the interrogation had become "custodial" for Miranda purposes because the questioning officer already had probable cause to justify an arrest for the offense which was the subject of the questioning. *Id.* The Court pointedly stated, "We cannot sanction a subterfuge interview whose sole purpose was to obtain additional incriminating information to facilitate a conviction before formally arresting Lewis." *Id.*

Similarly, even if this Court reasoned that Mr. Harris could terminate the encounter, under *Lewis,* the questioning was nevertheless custodial. "Interrogation involves express questioning, words or actions on the part of the police, other than those attendant to arrest and custody, that are likely to elicit an

incriminating response." *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). Here, the officer knew of the alleged assault and specifically asked "What happened at the apartment?" The question was designed to obtain incriminating information. *Miranda* warnings exist to protect an accused's right not to make incriminating statements while he is in police custody. *State v. Lorenz,* 152 Wash.2d at 36.

Under *Miranda,* before conducting a custodial interrogation, an officer must advise the suspect of his rights regarding the interrogation. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Absent this warning, a suspect's statements during a custodial interrogation are presumed to be involuntarily given and cannot be used against him at trial. *State v. Hickman,* 157 Wn.App. 767, 772, 238 P.3d 1240 (2010).

Here, the officer provided no Miranda warning until after Mr. Harris had given the officer a statement. This statement should not have been admissible. Mr. Harris respectfully asks this Court to vacate his convictions and remand for suppression of the statement.

B. Mr. Harris's Constitutional Right To Confront His Accuser Was Violated.

A person accused of a crime has a constitutional right to confront his accuser. U.S. Const. amend. VI; U.S. Const. amend. XIV; Const. art. 1, § 22; *State v. Darden,* 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The crucial function of this right is to protect the accused from the use of ex parte statements as evidence against him in a criminal trial. *Crawford v. Washington,* 541 U.S. 36, 50–51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Whenever the right to confrontation is denied, the accuracy of the fact-finding process and fairness of the trial is called into question. *State v. Darden,* 145 Wn.2d at 620. This Court reviews *de novo* an alleged violation of the confrontation cause. *State v. Jasper,* 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

The "admission of testimonial hearsay statements of a witness who does not appear at a criminal trial violates the confrontation clause of the Sixth Amendment unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross-examination." *State v. Beadle,* 173 Wn.2d 97, 107, 265 P.3d 863 (2011)(internal citation omitted). Here, Ms. Gant absented herself from the trial and there had been no prior

opportunity for cross-examination. Mr. Harris strenuously objected to admission of the medical record and testimony by Dr. Scheer that Ms. Gant told her Mr. Harris caused her injuries.

"A statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" is hearsay. ER 801(c). Hearsay is inadmissible except as provided by the rules of evidence, other court rules, or by statute. ER 802. Hearsay within an exception becomes inadmissible if its admission violates a defendant's confrontation clause rights precluding testimonial hearsay. *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

ER 803(a)(4) an exception to the hearsay rule, allows admission of a "Statement for Purposes of Medical Diagnosis or Treatment." This rule specifically provides:

> (4) Statement for Purposes of Medical Diagnosis. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

To establish reasonable pertinence to diagnosis or treatment so as to make statement admissible under exception to hearsay

rule for statements made for medical diagnosis and treatment, (1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment. State v. Doerflinger,170 Wn.App. 650, 285 P.3d 217 (2012) review denied 177 Wash.2d 1009, 302 P.3d 180.

In a lengthy analysis, the *Butler* Court noted that as a general rule, statements attributing fault are not relevant to diagnosis or treatment. In the case of children who are suspected victims of abuse, their statements to medical professionals and social workers are reasonably relied on as part of the treatment in arranging safe living situations. *State v. Butler,* 53 Wn.App. 214, 217, 220, 766 P.2d 505, *review denied,* 112 Wn.2d 1014 (1989).

By contrast, here, Ms. Gant had already told the registered nurse she had contacted the police and she had a safe place to stay. (Exh. 9 p. 2). Similarly, the physician's notes reiterate that Ms. Gant had filed a police report. Her motive in making the system was not to promote treatment: she refused to see the social worker and said she had safe living arrangements.

The physician did not rely on Ms. Gant's statements for her diagnosis, bruising, or the treatment, 1000 mg of Tylenol.

Admission of the hearsay statements violated Mr. Harris's right to confront his accuser because Ms. Gant simply made herself unavailable to testify and there was no prior opportunity for cross examination. *Crawford,* 541 U.S. at 53-54.

Confrontation clause violations are subject to a harmless error analysis. *State v. Beadle,* 173 Wn.2d at 110. The State bears the burden of proving beyond a reasonable doubt that the error was harmless. *State v. Mares,* 160 Wn.App. 558, 248 P.3d 140 (2011). To determine whether error is harmless, Washington courts utilize "the overwhelming untainted evidence test." *State v. Smith,* 148 Wn.2d 122, 139, 59 P.3d 74 (2002). A constitutional error is harmless if the untainted evidence that is admitted is so overwhelming it necessarily leads to a finding of guilt. *State v. Guloy,* 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

A review of the evidence here leads to the conclusion that the error prejudiced Mr. Harris. The statement by Dr. Scheer was the only direct claim of the identity of the assailant. Ms. Gant did not want or have a perceived need for domestic violence services. The erroneous admission of the evidence entitles Mr. Harris to a new trial.

C. This Court Should Not Award Appellate Costs In The Event The State Substantially Prevails On Appeal And Submits A Cost Bill.

Should this Court reject Mr. Harris's argument on appeal, he asks this Court to issue a ruling denying costs on appeal due to his continued indigency.

RAP 14.2 authorizes the State to request the Court to order an appellant to pay appellate costs if the State substantially prevails on appeal. The appellate courts may deny or award the State the costs of appeal. RCW 10.73.160(1); *State v. Nolan,* 141 Wn.2d 620, 628, 8 P.3d 300 (2000); *State v. Sinclair,* 192 Wn.App. 380, 382, 367 P.3d 612 (2016). The indigent appellant must object before the Court has issued a decision terminating review to a cost bill that might eventually be filed by the state. *Sinclair,* 192 Wn.App. at 395-394.

RCW 10.73.160(1) permissively authorizes any court to require payment of appellate costs: "The court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The *Sinclair* Court reasoned that exercising discretion meant inquiring into a defendant's ability or inability to pay appellate costs. *Sinclair,* 192 Wn.App. at 392. If a defendant is indigent and lacks the ability

to pay, an appellate court should deny an award of costs to the State. *Sinclair,* 192 Wn.App. at 382.

The Washington Supreme Court recognized the widespread "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants, which include an interest rate of 12 percent, court oversight until LFOs are paid, and long term court involvement, which inhibits re-entry into the community and increases the chance of recidivism. *Blazina,* 182 Wn.2d at 836.

In *Sinclair,* the defendant was indigent, aged, and facing a lengthy prison sentence. The Court determined there was no realistic possibility he could pay appellate costs and denied award of those costs. *Sinclair,* 192 Wn.App. at 392.

Here, the trial court imposed only the statutorily mandated fees and found Mr. Harris indigent for his appeal. (CP 148-152). He is 55 years of age and serving a 48-month sentence. There are no facts suggesting that he has a work history or employable skills. Additionally, Mr. Harris told the court he has a significant and incurable illness. (2/5/16 RP 174). He does not have the current ability nor is it a realistic possibility he will likely have the future ability to pay appellate costs. Mr. Harris asks this Court to exercise its discretion and not award appellate costs if he does not

substantially prevail on appeal and the state submits a cost bill. *Sinclair,* 192 Wn.App. at 382.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Harris respectfully asks this Court to reverse his convictions.

Dated this 31st day of October 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the state of Washington, that on October 31, 2016, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the brief to the following:

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